# 92-2038

No. ——



IN THE

## Supreme Court of the United States

OCTOBER TERM, 1992

ASGROW SEED COMPANY,
*Petitioner,*

v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEES,
*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Plant Variety Protection Act, 7 U.S.C. §§ 2321-2581, provides legal protection for novel varieties of sexually reproduced plants. 7 U.S.C. § 2541 specifies the acts of infringement, including selling the novel variety. The District Court held that the exemption from infringement in 7 U.S.C. § 2543 allows a qualified person to save seed of a protected variety from a crop produced by that person and to sell no more than the amount of seed that would have been needed to produce another crop on that person's farm. The Court of Appeals for the Federal Circuit reversed.

The questions presented are:

(1) Whether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half of a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?

2) Whether the seed sales authorized by 7 U.S.C. § 2543 remain subject to the requirement in 7 U.S.C. § 2541(6) that notice be given to the purchaser that the seed being sold is a protected novel variety?

## PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the District Court and in the Court of Appeals are listed in the caption of the case. Pursuant to Supreme Court Rule 29.1, Asgrow states that it is a wholly-owned subsidiary of The Upjohn Company. Asgrow has no other publicly-owned parents, subsidiaries, or affiliates.

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## PETITION FOR WRIT OF CERTIORARI

Asgrow Seed Company ("Asgrow") respectfully petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit in the above-captioned proceeding.

### PREVIOUS OPINIONS IN THE CASE

The opinion of the Court of Appeals issued on December 21, 1992, and is reported at 982 F.2d 486. That opinion has been reprinted in Appendix ("App.") A, pp. 1a-14a. The Court of Appeals reversed the judgment of the United States District Court for the Northern District of Iowa, a decision that was rendered upon cross-motions for summary judgment. The memorandum opinion of the District Court is reported at 795 F. Supp. 915, and is reprinted at App. B, pp. 15a-26a.

On March 25, 1993, the Court of Appeals simultaneously denied Asgrow's petition for rehearing and declined Asgrow's combined suggestion for rehearing in banc. App. C, pp. 27a-28a. However, five of the eleven active judges on the Court of Appeals would have reheard the case in banc. App. C, p. 28a. One of those five, Judge Newman, filed a separate opinion dissenting from the denial of rehearing in banc. Judge Rader, the author of the Court of Appeals panel opinion, filed an additional opinion concurring in the denial of rehearing in banc. The two opinions accompanying the denial of rehearing in banc are reported at 989 F.2d 478, and are reprinted in App. C, pp. 28a-38a.

### JURISDICTION

The Court of Appeals denied Asgrow's timely petition for rehearing in an order dated March 25, 1993. Acting on a motion by Asgrow, the mandate of the Court of Appeals was stayed by an order of that court entered on April 12, 1993, pending final disposition of the issues raised by the present petition. App. D, p. 39a. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1338(a). The jurisdiction of the Court of Ap-

peals was invoked pursuant to 28 U.S.C. § 1292(a)(1) and 28 U.S.C. § 1292(c)(1). This court has jurisdiction to entertain the present petition under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutory provision at issue is the "Right To Save Seed" set forth in the first sentence of 7 U.S.C. § 2543, which provides:

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

The full text of 7 U.S.C. § 2543 has been reproduced at App. E, p. 41a. In light of the relationship between section 2543 and the infringement provisions in 7 U.S.C. § 2541, the full text of 7 U.S.C. § 2541 has been set forth at App. E, pp. 40a-41a.

## STATEMENT OF THE CASE

The Plant Variety Protection Act ("PVPA" or "Act"), 7 U.S.C. § 2321-2581, provides "patent-like" legal protection for sexually reproduced plants, including many economically important crops which comprise a basic and indispensable segment of American agriculture.[1] Since

[1] Asexually reproduced plants, such as those propagated by grafting or budding, have been legally protected since 1930 by Chapter 15 of the Patent Act, 35 U.S.C. §§161-164. *See Diamond v. Chakrabarty*, 447 U.S. 303, 313 (1980). A more extensive discussion of the history leading to the enactment of the PVPA will be provided in the amicus curiae brief to be submitted by the American Seed Trade Association in support of this petition.



the PVPA was enacted in 1970, the private development of novel plant varieties such as cotton, wheat, and soybeans has had a profound effect on the productivity and global competitiveness of American agribusiness. The entire plant breeding industry and its many benefits to agriculture in the United States are now threatened by the Court of Appeals' ruling in this case, which allows farmers to sell large quantities of PVPA-protected seed in direct competition with the owner of the novel plant variety.

### A. General Background

A "variety" is a sexually-reproducing plant that is self-generating. *See* 7 U.S.C. § 2401(a) (defining "novel variety" under the PVPA). Because a variety will perpetuate itself, the seeds from one generation produce plants in the next generation that are nearly identical in characteristics to those in the former. For that reason, a farmer can grow the same novel variety plants, and obtain the same beneficial results, without needing to purchase any additional seed from the seed company. If a particular variety is disease-resistant and/or high-yielding, its seed will have great commercial value when used for reproductive (seed) purposes.

For varieties such as lettuce, celery, and cotton, the seed of the sexually-reproduced plant may be incidental to the value of the crop. For others, such as wheat and soybeans, the primary value of the crop is the seed. In the case of the soybean varieties at issue here, it takes approximately one bushel of soybeans used as seed to plant an acre, and each bushel planted can produce yields of approximately 45 bushels of the same soybeans. Thus, a farmer will easily be able to save enough PVPA-protected soybeans as seed to replace what he started with, and still have many more bushels of soybeans to use or sell for other purposes.

A farmer's soybean crop will be utilized either for reproductive (seed) purposes or for non-reproductive (grain or feed) purposes. A farmer will usually sell his soybean crop to a grain elevator or processor for about $6 per bushel, where the soybeans will be processed for various end uses. At a cost of about $1 per bushel, some farmers have a portion of their soybeans cleaned and stored for future use as seed. Because the cleaned soybeans are often stored in unmarked brown paper bags, such seed is commonly referred to as "brown bag" seed.

Soybeans command a higher price when sold for use as seed than when sold for grain or feed. A farmer will be able to sell "brown bag" seed at a much lower price than the registered owner because the farmer does not incur the owner's research, development, conditioning, production, and marketing costs.[2] Thus, a farmer will be motivated to sell as much as possible of his soybean crop to others for use as seed, subject only to the limits imposed by market conditions, by his own farm needs, or by law.

**B. The Proceedings In The District Court**

Asgrow is the assignee of the Certificates of Plant Variety Protection covering the two PVPA-protected soybean varieties at issue in this case, which are marketed by Asgrow under the designations A1937 and A2234. Dennis and Becky Winterboer ("the respondents") are farmers who grow primarily corn and soybeans on a farm of about 800 acres in Clay County, Iowa. A majority of all crops grown on respondents' farm are used or sold for nonreproductive purposes. However, nearly all of the respondents' crop of Asgrow's PVPA-protected soybeans is sold by them as "brown bag" seed.

In 1990, the respondents used PVPA-protected soybean seed purchased from Asgrow to produce a crop of 12,037

[2] In 1990, the respondents sold their brown bag seed at an average price of $8.70 per bushel. In contrast, Asgrow's sales agents charged between $16.20 and $16.80 for each bushel of Asgrow seed.



bushels of Asgrow soybeans on 265 acres of their farm. The respondents then sold 10,529 bushels of that crop (over 85%) to others for use as seed, which was the maximum portion saleable as seed after broken or damaged soybeans had been removed. Each year since 1986, the respondents have sold their entire saleable Asgrow soybean crop to others for use as seed, and have purchased new seed directly from Asgrow to satisfy their own planting needs.

On January 24, 1991, Asgrow filed suit against the respondents in the United States District Court for the Northern District of Iowa, alleging infringement under 7 U.S.C. § 2541(1) for selling or offering to sell Asgrow's PVPA-protected novel soybean varieties, under 7 U.S.C. § 2541(3) for sexually multiplying Asgrow's novel varieties as a step in marketing those varieties for growing purposes, and under 7 U.S.C. § 2541(6) for dispensing Asgrow's novel varieties to another in a form which could be propagated without providing notice that the seeds were of a protected variety. The respondents defended by asserting that their activities were within the statutory exemption from infringement provided by 7 U.S.C. § 2543.

On cross-motions for summary judgment, the respondents contended that 7 U.S.C. § 2543 permitted unlimited quantities of a PVPA-protected novel variety grown from "authorized seed" [3] to be sold as seed without any liability for infringement as long as both the seller and the purchaser were persons whose "primary farming occupation is the growing of crops for sale for other than repro-

[3] The term "authorized seed" is used by petitioner to signify any "seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." *See* 7 U.S.C. § 2543. While usage of that term is in complete accord with the express terms of section 2543, it is inconsistent with the Court of Appeals' opinion, which failed to give any significance to the "descended from seed obtained" language in the statute. *See* App. A, p. 6a ("a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed [because p]urchasers of brown bag seed do not obtain the protected seed 'by authority of the [PVPA certificate] owner.'").

ductive purposes." App. B, p. 18a. The respondents claimed that they were free from infringement liability under the exemption in section 2543 on grounds that over half of all crops produced on their farm were sold for nonreproductive purposes, even though virtually all of their soybean crop produced from Asgrow's PVPA-protected seed was sold for reproductive purposes.

Asgrow maintained before the District Court that the respondents' interpretation could not have been intended by Congress as it would swallow up the protection provided by the PVPA and would defeat the purposes of the PVPA. Asgrow's position was that the only interpretation of section 2543 that was consistent with the purpose and wording of the Act is that a farmer could only be entitled to save as much seed as he could reasonably use to produce a crop on his farm during the next year. Then, if for some reason the farmer did not or could not plant his saved seed during the next growing season, he could sell such saved seed to another farmer without liability to Asgrow so that the farmer's saved seed would not be wasted.

On September 30, 1991, the District Court granted Asgrow's motion and denied the respondents' motion. *See* App. B. The District Court held that "[s]aved seed shall be limited to the amount of PVPA-protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs in the upcoming crop year." App. B, p. 24a. The District Court also concluded that a farmer selling seed in accordance with 7 U.S.C. § 2543 was required to give notice that the seed sold was a protected variety, as required by 7 U.S.C. § 2541(6). App. B, p. 17a n.2. Holding that the respondents were in violation of 7 U.S.C. § 2541(1) and (3), the District Court enjoined them from "selling any seed, except for saved seed, to other farmers, and/or engaging in any form of brown bagging." App. B, p. 24a.[4]

[4] On November 14, 1991, the District Court modified a footnote in its prior opinion to clarify that the issue of whether respondents had complied with Iowa labelling law, as required by 7 U.S.C. § 2543, had not been reached. App. B, pp. 25a-26a.



**C. The Proceedings In The Court Of Appeals**

The respondents filed an appeal of the District Court's injunction to the United States Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1292(c)(1). Twelve amicus curiae briefs were submitted to the Court of Appeals supporting Asgrow and an affirmance of the result reached by the District Court.[5] However, neither Asgrow nor the majority of the supporting amici directly endorsed the specific statutory analysis employed by the District Court to explain its result.

On December 21, 1992, the Court of Appeals reversed. The Court of Appeals held that 7 U.S.C. § 2543 did not contain any language that quantitatively limits a farmer's sale of PVPA seed to the amount of seed necessary to grow another crop. *See* App. A. Instead, the Court of Appeals held that section 2543 permitted up to half of every crop produced by any person from seed obtained by authority of the PVPA certificate owner to be sold as seed in competition with the certificate owner, as long as at least fifty percent of the selling person's crop in that specific PVPA-protected variety is sold for nonreproductive purposes.[6] App. A, pp. 7a-9a.

[5] The twelve amicus curiae briefs were submitted to the Court of Appeals by (1) Agrigenetics Company; (2) Agripro Bioscience Inc.; (3) the American Seed Trade Association; (4) Dekalb Plant Genetics; (5) Delta and Pine Land Company; (6) Dole Fresh Vegetables, Inc. and Bud Antle, Inc.; (7) Golden Harvest Seeds, Inc.; (8) Jacob Hartz Seed Company, Inc.; (9) Northrup King Co.; (10) Pioneer Hi-Bred International, Inc.; (11) Stoneville Pedigreed Seed Company; and (12) Tanimura & Antle, Inc. The Tanimura & Antle brief also sought to clarify language in the District Court's opinion implying that section 2543 limited the amount of seed that could be saved by a farmer for his own use, rather than merely limiting the amount of saved seed that could be sold.

[6] That striking alteration of the scope of PVPA-seed sales authorized by section 2543 aptly underscores the reason for the present petition. To illustrate, assume a farmer with a .1000-acre farm purchases 1000 bushels of PVPA-protected soybean seed from Asgrow and produces 45,000 bushes of Asgrow soybeans. Under

The Court of Appeals interpreted the introductory clause to the first sentence of section 2543 to mean that a farmer within the "crop exemption" [7] remains subject to infringement under subsections (3) and (4) of 7 U.S.C. § 2541 but is exempted from liability for any acts prohibited by subsections (1), (2), (5), (6), (7), and (8). App. A, pp. 6a, 13a. Based on that interpretation, the Court of Appeals disagreed with the District Court's conclusion that any sales of PVPA-protected seed permitted under section 2543 were still subject to the notice requirement in 7 U.S.C. § 2541(6). App. A, p. 13a.

The only quantitative limitation on PVPA-seed sales that the Court of Appeals was able to discern from the statutory language of the exemtpion was that the seller and buyer of brown bag seed had to be persons whose "primary farming occupation is the growing of crops for sale for other than reproductive purposes." 7 U.S.C. § 2543. The Court of Appeals also held that, because "[t]he PVPA separately protects each novel seed variety," the "primary farming occupation" determination must be made on "a crop-by-crop basis" with respect to each specific novel variety protected under the Act.[8] App. A, p. 8a.

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the Court of Appeal's interpretation of section 2543, that farmer could then sell up to 22,500 bushels of his crop to other farmers for use as seed. In stark contrast, Asgrow contends that the exemption in section 2543 expressly limits that same farmer to selling no more than the 1000 bushels of seed needed to produce another crop on his farm, as concluded by the District Court.

[7] The Court of Appeals erroneously labelled the entirety of 7 U.S.C. § 2543 as "the crop exemption" and used that designation throughout its opinion. However, the title of section 2543, as well as the legislative history of the Act, demonstrates that the "crop exemption" is set forth wholly in the second sentence of 7 U.S.C. § 2543, while it is the "Right To Save Seed" set forth in the first sentence of section 2543 that is the only part of the statute at issue in this case. *See infra* section I.C.

[8] Due to its "crop-by-crop" methodology as to how the "primary farming occupation" determination was to be made, the Court of Appeals' analysis and ruling differed significantly from the respondents' position before the District Court and before the Court of Appeals.



Unable to find any suggestion in the legislative record to cast doubt on its own interpretation (App. A, pp. 9a-10a), the Court of Appeals explained that an incorrect ellipsis in the District Court's opinion resulted in "the omission of important language necessary for a correct interpretation." App. A, p. 11a. In rejecting the District Court's result along with its explanation, the Court of Appeals declared that "this court recognizes that, without meaningful limitations, the crop exemption could undercut much of the PVPA's incentives" but held that "[t]he Act, as written, however, contains no ensuing crop limitation as determined by the District Court." App. A, p. 12a.

Noting that section 2541(3) did not permit farmers to "market" protected novel varieties, the Court of Appeals cautioned that "an expansive reading of the term 'marketing' would swallow the entire crop exemption." App. A, p. 12a. To alleviate that concern, the Court of Appeals decided that " '[m]arketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." App. A, pp. 12a-13a. As a result, the Court of Appeals held that "[t]his form of marketing of sexually multiplied novel varieties violates exclusive rights under the Act, without regard to the crop exemption." App. A, p. 13a.

Judge Lourie, a member of the Court of Appeals panel, issued a concurring opinion that agreed solely with the panel's result and with "the panel's discussion of the limitation on saved seed which was the basis for the district court's decision." App. A, p. 14a. However, Judge Lourie stated that "I cannot join the remainder of the [panel's] opinion because it attempts to characterize and interpret other parts of this complex statute that I believe are not before us and have not been briefed." [9] App. A, p. 14a.

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[9] When ruling how a person's "primary farming occupation" was to be determined, the Court of Appeals did not have the benefit of

**D. Denial Of Asgrow's Suggestion For Rehearing In Banc**

The Jacob Hartz Seed Company, Inc. ("Hartz") submitted an amicus curiae brief to the Court of Appeals that supported the same conclusion reached by Asgrow and the District Court, *i.e.*, that a farmer could sell no more of his crop of a protected novel variety as seed under section 2543 than he would have needed to plant on his farm in the following year. Although the Hartz analysis of the statutory language of section 2543 differed somewhat from the other interpretations advanced before the District Court and the Court of Appeals, the Court of Appeals did not specifically address or even acknowledge the Hartz analysis.

In its combined petition for rehearing and suggestion for rehearing in banc, Asgrow reiterated the analysis of section 2543 that had been submitted to the Court of Appeals by Hartz, which had previously been only before the three-judge panel.[10] Asgrow's suggestion for in banc review was declined by a single vote, 6-5, with the two active judges on the panel among the six judges that did not vote to have the full Court of Appeals revisit the panel's decision. App. C, p. 28a.

Judge Newman issued an extensive opinion dissenting from the denial of Asgrow's suggestion for rehearing by the full Court of Appeals, stating that the panel "has reached an interpretation of [the first sentence of 7 U.S.C. § 2543] that is contrary to the statute and its purpose." App. C, p. 30a. Judge Newman further stated:

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any briefing. For purposes of the cross-motions for summary judgment, the parties had agreed that respondents' "primary farming occupation" was the growing of crops for nonreproductive purposes. Moreover, the basis for such a comparison (*e.g.*, acres planted, crop size, income received, etc.) was also not at issue between the parties. Finally, neither party even suggested that the term "marketing" had anything other than its ordinary meaning.

[10] The statutory analysis in the Hartz amicus curiae brief and in Asgrow's suggestion for rehearing in banc also constitutes the legal position set forth in this petition.



> The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety. The panel majority, by allowing up to half of a farmer's crop to be sold as seed, authorizes this practice, in a travesty of statutory interpretation.

App. C, p. 32a (footnote omitted). Judge Newman also observed that "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." App. C, p. 30a.

Judge Rader, the author of the Court of Appeals opinion, took the unusual step of responding to Judge Newman's dissent. Four days later, he issued a separate opinion concurring in the denial of Asgrow's suggestion for rehearing. App. C, pp. 28a-30a.

**REASONS FOR GRANTING THE WRIT**

The legal protection provided by Congress in the PVPA to owners of novel plant varieties is critical to the private seed breeding industry's continued and future research activities in developing new and improved varietal seeds and bringing them to the market. That vital and needed protection has now been effectively repealed by the Court of Appeals' faulty interpretation of 7 U.S.C. § 2543. Unless the statutory language of the first sentence of section 2543 is restored to its intended interpretation by this Court, the renewed development and continued competitiveness of American agriculture in plant varieties will be crippled by a poorly-reasoned ruling that is contrary to the language of section 2543, its legislative history, and Congress's express intent and purpose for the Act.

The Act expressly provides that "[i]t is the intent of Congress to provide the indicated protection for new varieties *by exercise of any constitutional power needed for that end*." 7 U.S.C. § 2581 (emphasis added). Yet the Court of Appeals' construction of section 2543 subverts that congressional intent by creating an immense loophole to section 2541 that eviscerates the incentives

and protections that Congress intended the Act to provide.[11]

This petition will establish that the Court of Appeals' interpretation of the first sentence of 7 U.S.C. § 2543 is wrong as a matter of law. More importantly, this petition will demonstrate that the ramifications of leaving the Federal Circuit's opinion as the controlling precedent as to the meaning of section 2543 will be devastating for the nation's agriculture, its farmers, and the PVPA itself.

## I. THE COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE, THE EXPRESS INTENT OF CONGRESS, AND THE STATED PURPOSES FOR THE ACT

Statutes should be construed to avoid attributing absurd results to Congress. *E.g., Oates v. First National Bank of Montgomery,* 100 U.S. (10 Otto) 239, 244 (1879). However, this is not a case in which the Court is being asked to interpret a statute in a manner contrary to its literal wording so that the statutory purpose or legislative intent can be preserved in spite of conflicting statutory language. In this case, the express wording of the statute, the explicit congressional intent set forth in the Act itself, and the stated purposes and polices for the Act are entirely consistent. Instead, it is the interpretation by the Court of Appeals that creates the absurd consequences that are wholly inconsistent with the express language, history, and purpose of the Act.

As aptly stated by Judge Newman, the Court of Appeals' construction of the first sentence of 7 U.S.C. § 2543 as allowing up to half of every crop produced

[11] *See, e.g., A.H. Phillips, Inc. v. Walling,* 324 U.S. 490, 493 (1945) (any exemption from legislation must be narrowly construed, giving due regard to the plain meaning of the statutory language and the intent of Congress). By construing the exemption from infringement in section 2543 so that respondents are able to sell *over twenty-two times* more soybean seed than they planted, the Federal Circuit has truly formulated an exception that swallows the rule.



from PVPA-protected seed to be sold as seed is truly "a travesty of statutory interpretation." App. C, p. 32a. If that interpretation is accepted, relatively few persons selling "brown bag" seed will be able to supply the entire market for a certificate owner's protected seed.[12] That is certainly not what Congress intended when it passed the PVPA to encourage private enterprise to invest in the research and development needed to produce new and better varieties. More importantly, that is not what Congress did.

### A. By Excepting Action That Might Infringe Under 7 U.S.C. § 2541(3), Congress Limited The Amount Of A Novel Variety That Could Be Sold As Seed Under Section 2543

Without more, the mere act of saving the crop of a novel variety produced from "authorized seed" is not an infringement under any subsection of 7 U.S.C. § 2541. A farmer may plant, grow, and harvest as much of a protected novel variety as he is able, as long as he only saves it, uses it himself, or sells it to another for non-reproductive purposes. Infringement issues usually arise only when a farmer competes with the PVPA certificate owner by selling PVPA-seed produced on his farm.

Allowing farmers to sell their crops of PVPA-protected varieties as seed, at prices well below what the owner of the novel variety must charge to recover its development costs, will eventually strangle the private plant breeding industry that the PVPA was enacted to stimulate. Recognizing that, Congress provided a quantitative limitation in section 2543 on the amount of a PVPA-protected novel variety produced by a farmer that could be sold for reproductive purposes to other farmers.

The Federal Circuit construed section 2543 so that the "primary farming occupation" phrase is the only

[12] In 1990, Asgrow sold enough of its soybean seed in Iowa to plant 500,000 acres. Thus, only fifty farmers selling as much Asgrow seed as the respondents would eliminate Asgrow from the Iowa market in its own protected varieties.

quantitative restriction on the amount of a novel variety that may be sold as seed. However, that is not the quantitative limitation created or intended by Congress.[13] As shown below, the first sentence of section 2543, as enacted by Congress, expressly contains the specific quantitative limitation on a farmer's right to sell PVPA seed that was identified by Asgrow and the District Court—that amount of seed needed by the farmer to produce another crop on his farm.

### 1. *The Federal Circuit Misconstrued The Introductory Clause Of Section 2543 And Its Incorporation Of Section 2541(3)*

"It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.' " *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 683 (1985). 7 U.S.C. § 2543 starts with the following language:

> *Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title*, it shall not infringe any right hereunder for a person to save seed produced by him . . . and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . . . (Emphasis added.)

App. E, p. 41a.[14] The Court of Appeals concluded that the introductory clause meant that a farmer falling within the exemption set forth in section 2543 remains subject to infringement under subsections (3) and (4) of 7

[13] *See* App. C, p. 36a (Newman, J., dissenting) ("[t]he panel has misinterpreted this text, for this provision is directed to whether a farmer may sell *any* saved seed, not how much seed the farmer may sell (emphasis in original)).

[14] Subsection 2541(3) provides that it is an act of infringement to "sexually multiply the novel variety as a step in marketing (for growing purposes) the variety." App. E, p. 40a. As no infringement under 7 U.S.C. § 2541(4) was alleged in this case, the introductory clause of section 2543 will be discussed herein only in terms of its incorporation of the provisions of section 2541(3).



U.S.C. § 2541, but not under subsections (1), (2), (5), (6), (7), and (8). App. A, p. 6a. That construction distorts the words and phrasing used by Congress in section 2543 and skews the relationship between section 2543 and the provisions in section 2541.

Contrary to the Federal Circuit's cursory analysis, the introductory clause of section 2543 only means that the rest of its first sentence does not apply if the action in question constitutes sexually multiplying a PVPA-protected novel variety as a step in marketing the variety for growing purposes. There can be no question that the respondents "sexually multiplied" a protected novel variety because it is not disputed that they produced 45 bushels of soybeans from each bushel of Asgrow seed. It is also undisputed that the respondents sold nearly all such soybeans produced for use as seed (*i.e.*, for growing purposes) without authorization from or compensation to Asgrow. Thus, the sole remaining question is the extent to which that action by respondents constituted "a step in marketing" the Asgrow soybean varieties for growing purposes.

Absent an express definition in the statute, the term "marketing" in section 2541(3) should be given its ordinary, common meaning. *E.g., Perrin v. United States*, 444 U.S. 37, 42 (1979). Without support, however, the Federal Circuit announced that " 'marketing' in the context of the PVPA is limited to extensive or coordinated selling activities, such as advertising, using an intervening sales representative, or similar extended merchandising or retail activities." App. A, pp. 12a-13a. However, it is "selling" that is an element of "marketing," not *vice versa*. *Cf. Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir.) ("We think the term *marketing* is far broader than the word *sell*."), *cert. denied*, 419 U.S. 999 (1974).

For purposes of section 2541(3), "marketing" can only be interpreted to include *all* acts that lead up to and include selling PVPA-seed for reproductive purposes, in-

cluding direct farmer-to-farmer sales of saved seed.[15] In all cases where PVPA-seed has been sold by a person who produced that seed, the "sexual multiplication" of the novel variety which led to that person having any seed to sell is clearly "a step" in the marketing of the novel variety for growing purposes. Without that step, there would be no seed for the farmer to sell.

### 2. *The Only Portion Of A Crop Produced From Authorized Seed That Can Be Sold As Seed Under Section 2543 Is The Amount Needed To Produce Another Crop On The Farmer's Own Farm*

Congress provided a specific quantitative limitation on the amount of PVPA seed that can be sold under section 2543 by expressly excepting action that might constitute an infringement under section 2541(3). That limitation is the portion of a farmer's crop that was sexually multiplied *not* as a step in marketing the novel variety, but only for future use as seed on the farmer's own farm. It is only that amount of saved seed that can be permissibly sold to others for use as seed under the remainder of the first sentence in section 2543, and it is that amount which is the maximum part of a farmer's crop that can be the "such saved seed" to which the rest of that first sentence applies.

To illustrate, assume that a farmer with a 1,000-acre farm plants Asgrow's PVPA-protected soybean seed on his farm and produces a crop of 45,000 bushels (45 bushels per acre). The most that the farmer would need to save to use in the production of another crop on his

[15] *Webster's New World Dictionary*, 828 (3d col. ed. 1988), defines "marketing" as (1) "the act of buying and selling in a market" and (2) "all business activity involved in the moving of goods from the producer to the consumer, including selling, advertising, packaging, etc." The Federal Circuit relied on the same dictionary to obtain the "customary meaning" of the term "primary" as used in section 2543. App. A, p. 8a. There is no indication that Congress used ordinary definitions for some common words in section 2543 but not for others. *See* App. C, p. 35a.



farm would be 1,000 bushels (1 bushel of seed per acre). If the farmer saves more than 1,000 bushels to use as seed, he must be presumed to have done so in order to sell it because that excess seed will not be needed to produce a crop on his farm. Thus, any of the remaining 44,000 bushels from his crop that are sold for use as seed are outside the scope of the exemption in the first sentence of section 2543 because such seed will necessarily have been sexually multiplied as a step in marketing the novel variety for growing purposes.

The 1000 bushels of seed is the maximum amount that the hypothetical farmer could possibly have produced *without* having undertaken sexual multiplication as a step in marketing the protected variety for growing purposes. Those 1000 bushels of soybean seed saved to plant the farmer's own farm constitute the "such saved seed" referenced in section 2543. Thus, the Court of Appeals plainly erred when it concluded that "section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop." App. A, p. 11a.

It is the initial exception from section 2541(3) that provides the quantitative limit on the amount of a protected novel variety that a farmer can later sell for use as seed under the terms of the statute, *i.e.*, the amount of seed necessary to produce a crop in that variety on the farmer's own farm.[16] Such a quantitative limitation does not create an undue hardship on the farmer who has already opted to benefit from the increased yield and disease-resistance advantages of the novel variety. More-

[16] Contrary to the Federal Circuit's opinion (App. A, p. 11a), the District Court did not hold that one bushel of seed per acre was the applicable limit under section 2543 for all varieties. Unlike the Federal Circuit, Congress and the District Court recognized that the amount of seed needed to be planted per acre will differ for each novel variety at issue. *See* App. B, pp. 21a-22a & n.3. For that reason, section 2543 was written by Congress with functional terms that remain applicable and quantifiable in each specific set of circumstances.

over, if a farmer knows he is limited by law to selling only as much seed as woud be needed to produce a crop on his own farm, he will not save any more seed than he actually needs. Congress never intended the Act or section 2543 to convert farmers into commercial seed dealers.[17]

**B. After Limiting The Amount Of Saved Seed, Congress Allowed Sales Of "Such Saved Seed" To Take Place Between Farmers Without Violating Section 2541(3)**

Congress did not prohibit *all* sales of PVPA-seed by persons other than the owner. To the extent that "such saved seed" is not actually used to produce a crop on the farmer's farm, that limited amount of saved seed is available to be sold as provided.[18] The applicable provision is as follows:

> *Provided, That without regard to the provisions of section (3) of section 2541 of this title*, it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

App. E, p. 41a (emphasis added). After misconstruing the "first" reference to section 2541(3) in the introductory clause of section 2543, the Federal Circuit then failed to attribute any independent meaning to the "second" reference to section 2541(3) in the above provision.

"It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded every

[17] *See* App. C, p. 32a (Newman, J., dissenting) ("The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of the new variety.").

[18] In the previous example, the farmer could plant the 1,000 bushels of saved seed on his farm, or sell some or all of "such saved seed" to other farmers. However, no more than a total of 1000 bushels of saved seed could be planted *and* sold by that farmer.



word . . . [and] 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word, shall be superfluous, void, or insignificant.'" *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 410 (1914) (citation omitted); *see also* 2A Singer, *Sutherland Statutory Construction*, § 46.06 (1992). The Court of Appeals assumed that the two references to section 2541(3) were redundant, as its sole mention of them was the following: "[i]n two explicit references, the Act clarifies that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541." App. A, p. 12a. However, not only are the two references to section 2541(3) not redundant, but Congress included both for a specific purpose.

In the absence of the second reference to section 2541(3), a farmer would have no ability to sell any of the seed saved for use on his own farm because, as soon as the farmer decided to sell some of his "saved seed" to another, that seed would then have been sexually multiplied as a step in marketing it for growing purposes. By providing that the provisions of section 2541(3) are to be disregarded with respect to "such saved seed" sold in compliance with state law by a farmer to other farmers, Congress permitted a farmer to sell "such saved seed" (but no more) without being liable for having sexually multiplied that portion of his harvest as a step in marketing the novel variety for growing purposes (regardless of how "marketing" is defined).

The two distinct references to section 2541(3) in section 2543 were both necessary to accomplish Congress' stated purpose for the PVPA. Through its first reference to section 2541(3), Congress withheld nearly all of a farmer's harvest from the scope of the exemption set forth in the first sentence of section 2543; *i.e.*, that portion of the harvest in excess of that which was needed as seed in the production of a subsequent crop on that farmer's own farm. By so limiting the scope of the exemp-

tion, Congress afforded seed companies the opportunity to recoup the sizeable investments which resulted in the novel variety in the first place. Then, by adding the second reference to section 2541(3), Congress removed it as an obstacle to the farmer's sale of "such saved seed" as allowed by section 2543. In that manner, Congress allowed the farmers to avoid wasting any of their harvest without threatening the commercial viability of the private seed breeding industry it sought to stimulate.

Far from creating an absurd result, Asgrow's interpretation gives effect to both references to section 2541(3) and is true to the purposes that the PVPA was designed to foster. *See In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643-45 (1978). The same cannot be said of the interpretation made by the Court of Appeals or the one offered by the respondents.

**C. The Legislative History Confirms That The Right To Sell "Such Saved Seed" Is Limited To The Amount Needed For Producing A Crop On The Farm**

Asgrow's interpretation is entirely consistent with the applicable legislative history, which shows that section 2543 is a combination of two proposed provisions originally considered by Congress in the following form:

> Sec. 112. Right to Save Seed.
>
> Except under subsections (3) and (4) of section 111, it shall not infringe any right hereunder for a person to save seed and grow the resulting variety for his own use.
>
> Sec. 114 Crop Exemption.
>
> It shall not be an infringement to sell seed grown from the protected variety, obtained (for growing) by authority of the proprietor or by saving seed under section 112, for use as food, feed, in manufacture or the like, if the sale is bona fide for that purpose, and is in channels which are usual for that purpose and in a manner exclusively for that purpose.



H.R. Rep. No. 13631, 91st Cong., 1st Sess. 102-03 (1969). At that time, the proposed legislation contained no right to sell a protected variety for use as seed.

Sections 112 and 114 (and their titles) were later combined into a single section (Sec. 113) that is now 7 U.S.C. § 2543. Both houses of Congress summarized the newly-created ability of a qualified farmer to sell "such saved seed" for reproductive purposes as follows:

> Section 113. Right to Save Seed. Crop Exemption.
>
> This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; *to save seed from such crop for future use or planting on the farm*; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, *to sell such saved seed for reproductive purposes* to other persons so engaged.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 11, *reprinted in* 1970 U.S.C.C.A.N. 5082, 5093; S. Rep. No. 91-1138, 91st Cong., 2d Sess. 12 (1970) (emphases added). From those summaries, it should have been clear that the right to sell a protected novel variety was restricted only to the seed saved from the farmer's crop "for future use or planting on the farm."

Despite quoting the same provision in the legislative record, the Federal Circuit somehow reached the opposite view of its plain language, holding that "[a]t no point did the legislative context for the text of the 1970 Act suggest that the crop exemption contains an ensuing crop limitation." App. A, p. 10a. On the contrary, the "suggestion" sought by the Federal Circuit is quite explicit.

**D. The Notice Requirements Of Section 2541(6) Must Apply To Any Sales Made In Accordance With The Provisions Of 7 U.S.C. § 2543**

Except as otherwise provided, it is an act of infringement under 7 U.S.C. § 2541(1) to sell a novel variety. Because Congress did provide otherwise in section 2543

with respect to sales under certain conditions, there is no infringement under section 2541(1) to the extent that sales of a novel variety are made in accordance with the provisions of section 2543. There is also no infringement under section 2541(3) to the extent that the sales in question were limited to "such saved seed" as provided by section 2543. However, those exemptions from the acts of infringement set forth in subsections (1) and (3) of section 2541 are the sole extent of the exemptions provided by section 2543.

Congress did not grant a blanket exemption to section 2541 when it allowed a farmer to sell "such saved seed" in section 2543; it only exempted specified action. The only "action" described in the statute is (1) saving seed produced, (2) using such saved seed in the production of a crop, and (3) using such saved seed for sale as provided. Of those acts, only "selling" is an act of infringement. For that reason, section 2543 must be viewed as providing a limited exemption from infringement only with respect to those portions of section 2541 that prohibit the specific "action" later exempted: certain sales of a protected variety that would otherwise be infringements under subsections (1) and (3) of section 2541.

The Federal Circuit erred by holding that the absence of section 2541(6) from the introductory clause of section 2543 meant that any seed sales authorized by section 2543 were also exempted from the notice requirements in section 2541(6). App. A, pp. 6a, 13a. Section 2541(6) remains applicable to all transactions in which the novel variety has been dispensed to another in a form which can be propagated, including sales of "such saved seed" under section 2543.[19] The policies supporting giving notice to all recipients of a PVPA-protected seed remain

[19] In addition to subsection (6), the non-sale portions of subsection (1) and subsections (2), (5), (7), and (8) of section 2541 also remain applicable to sales authorized under section 2543. As one obvious example, a farmer making the limited seed sales permitted under section 2543 is still not able to import or export the novel variety in violation of section 2541(2).



constant, regardless of the type of transaction involved. Moreover, requiring notice on all seed sales, whether "brown bag" seed or not, is consistent with Congress' intent in 7 U.S.C. § 2567 that a purchaser or user of the protected seed have actual notice of prohibited acts before being subject to damages for infringement.

The interpretation of section 2543 reached by the Court of Appeals allows up to half of a person's crop in a protected variety to be sold as seed and then exempts this immense quantity of seed sales from the notice requirements of section 2541(6). That illogical combination of arbitrary results was never intended by Congress, defies the purposes of the PVPA, and is contrary to the explicit language of the Act.

## II. CERTIORARI IS NECESSARY TO CORRECT THE COURT OF APPEALS' CLEAR ERROR ON A MATTER OF NATIONAL IMPORTANCE

When the PVPA was enacted in 1970, the House Committee on Agriculture listed the benefits that were expected to accrue in the United States as a direct result of providing legal protection for plant varieties.

> 1. It will greatly stimulate plant breeding.
>
> 2. It will allow our Government agricultural experiment stations to increase their efforts on needed basic research.
>
> 3. It would permit public expenditures for applied plant breeding to be deviated to important areas which industry may not pursue.
>
> 4. It will give farmers and gardeners more choice, and varieties which are better in yield or in quality, and so forth.
>
> 5. It will make American agricultural products more competitive in world markets.
>
> 6. Consumers and other purchasers of crops will benefit; in some instances by improved quality, in others by aiding the production needed to serve them.

H.R. Rep. No. 1605, 91st Cong., 2d Sess. 2-3, *reprinted in* 1970 U.S.C.C.A.N. 5082, 5083. If left unaddressed by

this Court, the Federal Circuit's erroneous interpretation of section 2543 will ensure that each of the benefits and policies supporting enactment of the PVPA will be frustrated.

As recognized by Judge Newman, "it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture." App. C, p. 30a. Even before the Federal Circuit's ruling, major seed companies such as Pioneer Hi-Bred International, Inc., Agripro Biosciences Inc., and Northrup King Co. were among those that had abandoned existing and reduced future variety research programs due to unfair price competition from illegal "brown bag" seed sales of their own PVPA-seed.[20] Now, the Federal Circuit's flawed legal analysis will only cause a bad situation to become much worse.

The significant costs of plant breeding research must ultimately be justified through recouping that investment from sustained sales of the new varietal seeds which reach the market. The plant breeding industry cannot justify its research and development expenditures unless the results of its efforts will be adequately protected from infringement. If the Federal Circuit's interpretation of section 2543 is accurate, seed companies have wasted an enormous amount of time and money over the past twenty years in developing novel plant varieties that they never had any legitimate chance of being able to protect. Having enacted the PVPA to encourage private industry to dedicate the necessary resources to breed new and improved plants, Congress clearly did not intend such a result.

Moreover, it will not be the seed companies that will be harmed the most by the Court of Appeals' evisceration of the PVPA. The seed companies will be able to redirect

[20] For a more detailed summary of the scope and effects of brown bag seed sales on the seed industry's past and future research efforts, see the amicus curiae brief to be submitted by the American Seed Trade Association.



their research funds to hybrids and to asexually-reproduced plants protected by the Plant Patent Act. The seed companies will also be able to transfer their research and development efforts for new varieties to foreign countries which have greater and more enforceable legal protection for sexually-reproduced plants. As research in novel varieties is shifted to other countries, American farmers will be unable to compete effectively in the international agricultural market as foreign yields increase as a result of new and improved varieties not available in this country.

Without effective PVPA protection, American farmers will suffer the continuing loss of the benefit from a steady stream of novel, improved varieties of plants which private research breeding contributes to the advancement of the science. Agriculture in the United States will return to the pre-Act era in which plant breeding was done primarily through public universities, whose shortcomings led to the enactment of the PVPA in the first place. Only now, such public sector research will not be able to keep the United States at the forefront of the world agricultural market because funding for plant breeding research has been reallocated or has simply disappeared through budget cuts.

As more private seed companies abandon their research and breeding programs, the agricultural performance in the varieties will inevitably decline. As the number of new varieties decreases, the needed presence and diversity of desirable plant traits in the improved varieties will be lessened and lost. While existing varieties cease to improve and develop, diseases and insects will continue to evolve, thus further reducing yields and performance. American consumers will be faced with poorer selection and higher prices for crops and products of the affected plant varieties. Thus, the legal questions presented by this case have enormous long-term significance far beyond their short-term effect on the private research seed companies doing most of the current plant breeding in this country.

The nation's economy, trade balance, and tax base will all be adversely affected as agricultural imports increase, farm production decreases, and fewer persons are employed in farming and farming-related activities.[21] In light of the sizeable portions of the nation's trade, economy, taxbase, workforce, and population dependant upon the resulting crops of those varieties, the consequences of the Court of Appeals' erroneous analyses and result clearly are national in effect and magnitude.

## III. REVIEW MUST BE GRANTED NOW TO PRESERVE THE PVPA AS AN INCENTIVE FOR INNOVATION IN NOVEL VARIETIES AND TO PREVENT IRREPARABLE DAMAGE TO THE NATION'S AGRICULTURE AND ECONOMY

It is clear that Congress intended this Court to review decisions of the Federal Circuit where circumstances warrant. *See, e.g., Cornelius v. Nutt*, 472 U.S. 648, 657 (1985); H.R. Rep. No. 312, 97th Cong., 1st Sess. 18-19 (1981). The Court of Appeals' egregious analytical errors in this case, and the overwhelming adverse effect of those legal errors on the continued development and global competitiveness of American agriculture, highlight that the questions presented are of critical national importance that warrant immediate review by this Court.

While this case concerns the proper interpretation of a federal statute within the exclusive jurisdiction of the Federal Circuit, it does not pose legal issues that are within the Federal Circuit's particular expertise or experience. The panel opinion in this case is the first opinion dealing with the PVPA that the Federal Circuit has published in the ten-plus years of that court's existence.[22] In

[21] The acreage planted in soybeans alone in this country amounts to over 58,000,000 acres, and the total acreage planted in the many other varieties/species in this country is much, much greater. More significantly, the sales revenues generated from the many varietal crops affected by this decision is well into the billions of dollars.

[22] *See* App. A, p. 4a ("The statutory interpretation of the PVPA crop exemption, 7 U.S.C. § 2543, is a case of first impression for this court.").



any event, the legal questions presented by this case require only the application of traditional tools of statutory construction, which is certainly not subject matter unique to the Federal Circuit.

This Court has granted certiorari in other statutory interpretation cases within the exclusive jurisdiction of the Federal Circuit where important federal interests or statutory schemes were at issue. *See, e.g., Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (determining whether medical devices were within the scope of the statutory exemption from patent infringement provided in 35 U.S.C. § 271(e)(1)); *United States v. Fausto*, 484 U.S. 439 (1988); *United States v. Morton*, 467 U.S. 822 (1984). Even in the absence of a direct conflict between a decision of the Federal Circuit and another federal appellate court, this Court has granted certiorari to review decisions of the Federal Circuit that have raised similar issues of special national importance. *See, e.g., Cardinal Chem. Co. v. Morton Int'l, Inc.*, 61 U.S.L.W. 4461, 4463 (1993).

Because appeals of cases arising under the PVPA are exclusive to the Federal Circuit under 28 U.S.C. § 1295, a direct conflict between the Federal Circuit and other circuits with respect to the interpretation of the PVPA in general, and section 2543 in particular, is not likely to develop. However, one indirect conflict already exists from a PVPA appeal decided before the Federal Circuit was created. In *Delta and Pine Land Co. v. Peoples Gin Co.*, 694 F.2d 1012, 1015-17 (5th Cir. 1983), *aff'g*, 546 F. Supp. 939 (N.D. Miss. 1982), the Fifth Circuit affirmed that sales of PVPA-protected seed must be made by the producing farmer directly to another such farmer without the active intervention of a third party in order to qualify for the exemption under section 2543.

Although the amount of PVPA seed that could be sold under section 2543 was not at issue, the Fifth Circuit's reasoning in the *Delta and Pine* case reveals that the

Federal Circuit misapprehended the purposes and policies of the PVPA.

> The broader the construction given the exemption [in section 2543], the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains. The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost. Although it may appear that the broadest reading of the exemption would benefit farmers today, it would be detrimental to their interests tomorrow.
>
> Thus, the narrower reading of the exemption is more in keeping with Congress' primary objective.

694 F.2d at 1016. The clear disagreement between the two Circuit Courts over whether to interpret the exemption from infringement in section 2543 narrowly or broadly, in order to fulfill the intent of Congress, is another strong reason why a writ of certiorari should issue in the present case.

Prior to the Federal Circuit, no other federal court had interpreted the protections of the PVPA narrowly or the exemption from infringement in section 2543 broadly. The district court in this case realized it was "necessary . . . to interpret the statute in a manner which will dictate that the intent of Congress in enacting the PVPA will be accomplished." App. B, p. 20a. The district court in *Delta and Pine* stressed that "[s]ection 2543 must . . . be construed in such manner as not to frustrate the declared purposes of the [Act]." 546 F. Supp. at 939. On appeal, the Fifth Circuit confirmed that section 2543 "was not intended to provide farmers with unlimited insulation from the negative side effects of the Act." 694 F.2d at 1016. In direct contrast, the Federal Circuit's analysis and outcome in this case clearly do not comport with the Act and its stated purposes.



The need for review on writ of certiorari is further evidenced by the substantial conflict that this case created within the Federal Circuit as to the proper interpretation of section 2543. Asgrow's suggestion for rehearing in banc was declined by a single vote. Notably, five of the nine active judges not on the original panel voted to rehear the case after seeing the legal analysis in this petition for the first time in Asgrow's in banc suggestion. Judge Newman issued a sharp dissent that outlined numerous errors in the interpretation, analysis, and result reached by the panel. App. C, pp. 30a-38a. Even Judge Lourie, a member of that panel, would not join much of what the majority took upon itself to address and decide. App. A, p. 14a.

In light of the far-reaching and clearly erroneous interpretation of section 2543 in this case, there is virtually no chance the Federal Circuit's own precedent will be able to develop in a manner that will overcome the devastating impact of this single decision. If the best possible outcome of a future suit to enforce PVPA rights will be to restrict persons to selling only half of their crop as seed, the owner's market for such varieties will still be overwhelmed by "legitimate" brown bag seed. In that situation, future infringement suits over brown bag seed sales could not protect an owner's PVPA rights. Thus, if the important questions of federal law raised by this petition are ever to be corrected, they need to be addressed by this Court now.

The PVPA itself, the private plant breeding industry, and the nation's agriculture should not be left crippled by "a travesty of statutory interpretation" merely because the meaning of the statutory language has proved to be somewhat elusive prior to reaching this Court. In light of the striking disagreement and confusion among the learned judges (and attorneys) that have already attempted to pursue the words of section 2543 to their proper and intended meaning, this Court should grant the

requested writ to clarify and settle the correct interpretation of this important federal statute.

## CONCLUSION

The legal questions raised by this petition are vital to upholding the purposes of the PVPA, and to preserving the viability and continued existence of the plant breeding industry in the United States. Proper resolution of these questions is critical to the future ability of the American farmer to compete in the increasingly-global agricultural marketplace, and to ensure a continued supply of new, improved, and low-cost agricultural products to the American consumer.

Simply put, Congress did not enact the law that the Court of Appeals legislated through its erroneous interpretation of section 2543. Moreover, the ramifications of not granting certiorari in this case would be immense. For all of the reasons set forth herein, Petitioner respectfully requests that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Dated: June 23, 1993

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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No. 92-1048

ASGROW SEED COMPANY,
*Plaintiff-Appellee,*
v.
DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEE'S,
*Defendants-Appellants.*

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Dec. 21, 1992

Rehearing Denied; Suggestion for
Rehearing In Banc Declined
March 25, 1993*

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Gary Jay Kushner and Mark D. Dopp, Hogan & Hartson, Washington, DC, were on the brief, for amicus curiae, American Seed Trade Ass'n, Northrup King Co., Dole Fresh Vegetables, Inc. and Bud Antle, Inc. and The Agrigenetics Co.

Richard L. Stanley and John F. Lynch, Arnold, White & Durkee, Houston, TX, were on the brief, for amicus curiae, Jacob Hartz Seed Co., Inc. With them on the brief was Mark F. Wachter, Monsanto Co., St. Louis, MO, of counsel.

Michael Joseph Roth, Des Moines, IA, was on the brief, for amicus curiae, Pioneer Hi-Bred Intern., Inc.

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* See 1993 WL 84941.

Jerome C. Hafter and Marian S. Alexander, Lake, Tindall, Hunger & Thackston, Greenville, MS, were on the brief, for amicus curiae, Delta and Pine Land Co. With them on the brief was E. Anthony Figg, Rothwell, Figg, Ernst & Kurz, Washington, DC, of counsel.

Bruce Stein, The UpJohn Co., Kalamazoo, MI, argued, for plaintiff-appellee. With him on the brief were Lawrence C. Maxwell and Mary Ellen Morris, Trabue, Sturdivant & Dewitt, Nashville, TN. Also on the brief were Robert A. Armitage and Sidney B. Williams, Jr., The UpJohn Co., Kalamazoo, MI, of counsel.

William H. Bode, William H. Bode & Associates, Washington, DC, argued, for defendants-appellants. With him on the brief was Robert A. Jaffe.

Constantine L. Trela, Sidley & Austin, Chicago, IL, was on the brief, for amicus curiae, DeKalb Plant Genetics. With her on the brief was Gina E. Brock. Also on the brief was Douglas Fisher, DeKalb Plant Genetics, DeKalb, IL, of counsel.

William Dennis Cross and Scott T. Forland, Morrison & Hecker, of Kansas City, MO, were on the brief, for amicus curiae, Agripro Biosciences, Inc.

Robert J. Jondle and Jeffrey I. Ihnen, Venable, Beatjer, Howard & Civiletti, Washington, DC, were on the brief, for amicus curiae, Golden Harvest Seeds, Inc.

Martin R. Glick and Todd E. Thompson, Howard, Rice, Nemerovski, Canady, Robertson & Falk, San Francisco, CA, were on the brief, for amicus curiae, Tanimura & Antle, Inc.

Stanley D. Schlosser, Foley & Lardner, Alexandria, VA, was on the brief, for amicus curiae, Stoneville Pedigreed Seed Co. With him on the brief was Patricia D. Granados, of counsel.

Before LOURIE, Circuit Judge, SMITH, Senior Circuit Judge, and RADER, Circuit Judge.



RADER, Circuit Judge.

Dennis and Becky Winterboer appeal a permanent injunction and order granting Asgrow Seed Company's motion for summary judgment. The United States District Court for the Northern District of Iowa held that 7 U.S.C. § 2543 (1988) (the crop exemption) of the Plant Variety Protection Act (PVPA or Act) quantitatively limits a farmer's sale of PVPA seed to the amount of seed necessary to grow another crop (ensuing crop limitation). *Asgrow Seed Co. v. Winterboer,* 795 F.Supp. 915, 22 USPQ2d 1937 (N.D.Iowa 1991). Because the district court misinterpreted the PVPA crop exemption, this court reverses and remands.

## BACKGROUND

The PVPA, 7 U.S.C. §§ 2321-2582 (1988), protects novel varieties of sexually reproduced seed, transplants, and plants. This protection extends to distinct, uniform, and stable new seed varieties. 7 U.S.C. § 2401. The developer of a novel variety obtains protection by acquiring a certificate of protection from the Plant Variety Protection Office. 7 U.S.C. §§ 2421, 2422, 2481-2483. A PVPA certificate grants the breeder the right to exclude others from "selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom." 7 U.S.C. § 2483(a). PVPA protection lasts for 18 years. 7 U.S.C. § 2483(b). The PVPA provides remedies for infringement of exclusive rights under the Act. 7 U.S.C. §§ 2541, 2561.

Asgrow, a subsidiary of The Upjohn Company, develops novel varieties and sells them to farmers. Asgrow has obtained PVPA protection for two novel soybean seed varieties, A1937 and A2243.

The Winterboers own and operate a farm in Clay County, Iowa. The Winterboers grow corn and soybeans.

The Winterboers sell soybean crops for food and feed. In addition, the Winterboers sell harvested soybean seed to other farmers who, in turn, use the seed to plant future crops.

Often farmers place harvested planting seed in plain brown bags for sale to other farmers. Therefore, "brown bag sales" refers to the sale of harvested seed from one farmer to another for planting future crops. The Winterboers engaged in brown bag sales by selling novel varieties A1937 and A2243 to other farmers.

Asgrow brought this infringement action against the Winterboers seeking damages and a permanent injunction. Asgrow seeks to enjoin the Winterboers' sale of seed harvested from crops grown with novel varieties A1937 and A2243. Asgrow alleges that the Winterboers' brown bag sales infringe its PVPA rights. The Winterboers admit selling brown bag seed harvested from Asgrow's novel varieties. However, the Winterboers deny all liability, alleging that their sales fit within the PVPA's crop exemption. 7 U.S.C. § 2543.

The district court conducted evidentiary hearings in March 1991. Both parties moved for summary judgment. On September 30, 1991, the district court granted Asgrow's summary judgment motion and issued a permanent injunction against the Winterboers.

## DISCUSSION

This court has exclusive jurisdiction over appeals involving the PVPA. 28 U.S.C. §§ 1295(a)(1), 1338 (1988). This court reviews the district court's grant of summary judgment *de novo*. *National Cable Television Ass'n v. American Cinema Editors, Inc.*, 937 F.2d 1572, 1576, 19 USPQ2d 1424, 1427 (Fed.Cir.1991). The statutory interpretation of the PVPA crop exemption, 7 U.S.C. § 2543, is a case of first impression for this court.



The PVPA grants patent-like protection for sexually reproduced plants.[1] The Act explains its purpose:

> It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties. Constitutional clauses 3 and 8 of article I, section 8 are both relied upon.

7 U.S.C. § 2581. Thus, the 1970 Act provides exclusive rights for a term of eighteen years to encourage the development and marketing of novel plant varieties, thereby promoting the progress of agriculture. *See* H.R.Rep. No. 1605, 91st Cong., 2d Sess. 1-3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5082-84; S.Rep. No. 1138, 91st Cong., 2d Sess. 1 (1970). The Act provides incentives for seed companies to increase their research and development of novel seed varieties. *See* H.R.Rep. No. 91-1605 at 1. The PVPA's exclusive rights provide those incentives for innovation.

To enforce PVPA exclusive rights, the 1970 Act provided a remedy for infringement. Infringement is the unauthorized practice of a right granted exclusively to the PVPA certificate holder. 7 U.S.C. § 2541. Among other activities, the unauthorized sale of seed harvested from crops grown with novel varieties is infringement. 7 U.S.C. § 2541.

The crop exemption, however, provides a limited exemption from section 2541. Under specified circumstances, farmers may save and sell seed harvested from

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[1] In 1930, forty years before enactment of the PVPA, the Plant Patent Act became law. 35 U.S.C. §§ 161-164 (1988). The Plant Patent Act provides patent protection to novel varieties of "non-sexually" reproduced plants. The 1970 Act, therefore, protects "sexually" reproduced plants, while the 1930 Act protects "non-sexually" reproduced plants. *See Diamond v. Chakrabarty*, 447 U.S. 303, 313, 100 S.Ct. 2204, 2210, 65 L.Ed.2d 144 (1980).

crops grown from PVPA seed. This lengthy and complex provision has several important clauses:

> *Except to the extent that such action may constiute an infringement under subsections (3) and (4) of section 2541 of this title . . . .*

7 U.S.C. § 2543 (emphasis added).

Section 2541 defines infringement. Section 2543's introductory clause thus states that the crop exemption does not exempt a farmer from liability for two forms of infringement: sexually multiplying the novel variety as a step in marketing, or using the novel variety in producing (as distinguished from developing) a hybrid or different variety. *See* 7 U.S.C. § 2541(3) and (4). A farmer within the crop exemption remains exempt from the other acts of infringement, including selling the novel variety, offering it for sale, or dispensing the novel variety to another without notice of PVPA protection. *See* 7 U.S.C. §§ 2541(1) and (6), 2543.

> *[I]t shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes . . . .*

7 U.S.C. § 2543 (emphasis added).

A farmer does not infringe by saving seed harvested from a crop grown from PVPA seed. However, the farmer must have obtained that PVPA seed by authority of the PVPA certificate holder and with the intent to grow a crop.

This language does not limit the amount of seed a farmer can save. Under these terms, however, a farmer who purchases PVPA seed from another farmer cannot save any seed from the crop grown with brown bag seed. Purchasers of brown bag seed do not obtain the protected seed "by authority of the [PVPA certificate] owner."



Thus, while an authorized purchaser of protected seed can save harvested seed under section 2543, a purchaser of protected brown bag seed cannot save any seed.

> *[A]nd use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section. . . .*

7 U.S.C. § 2543 (emphasis added).

The crop exemption allows those farmers who may save seed to use it to produce a crop on their own farm or to sell it under limitations within the exemption. This provision thus permits, without threat of infringement, the sale of saved seed from crops grown with PVPA seed. To sell the saved seed, however, a farmer must comply with several statutory requirements.

> *Provided, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes. . . .*

7 U.S.C. § 2543 (emphasis added).

The exemption places further conditions on brown bag sales of saved seed from a crop grown from PVPA seed. Both the buyer and seller of brown bag seed must be farmers. Moreover, their primary farming occupation for the crops produced from a novel variety must be to grow crops for sale as food or feed, rather than to grow crops for sale as seed. The exemption does not permit brown bag sales if either the buyer or the seller primarily grows crops from the novel variety to produce seed (for reproductive purposes). Rather both buyer and seller must primarily grow crops from the PVPA novel variety for consumption or other non-reproductive uses.

In this context, "primary" carries its customary meaning of "first in importance; chief; principal; main." *Webster's New World Dictionary*, 1069 (3d col. ed. 1988). This "primary" qualifier applies to the farming occupation of growing crops from novel seed varieties. The PVPA separately protects each novel seed variety. In addition, the various sections of the Act illustrate the rights available to specific novel varieties.

Indeed, the title of section 2543 is "crop exemption," not "primary farming exemption." This title and the context of the Act show that the PVPA applies this crop exemption on a crop-by-crop basis (i.e., on a "crops produced from a particular novel seed variety-by-crops produced from a particular novel seed variety" basis). The phrase "primary farming occupation is the growing of crops" applies to crops produced from a particular novel variety. Thus, buyers or sellers of brown bag seed qualify for the crop exemption only if they produce a larger crop from a protected seed for consumption (or other nonreproductive purposes) than for sale as seed.

Thus, to determine application of the crop exemption, a court must determine the amount of crops a farmer grows for sale to consumers and the amount of crops a farmer grows for brown bag sales to other farmers. If a farmer grows more crop from a protected seed variety for sale to consumers than for sale to other farmers for planting, that farmer qualifies under this requirement to buy or sell saved seed. The farmer who qualifies under the entirety of section 2543's requirements can then sell less than half of the crop grown from a specific novel variety as brown bag seed. A court must conduct this inquiry for each crop or variety of PVPA certified seed.

> *[P]rovided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.*



7 U.S.C. § 2543 (emphasis added). The remainder of section 2543 requires compliance with applicable state laws and clarifies additional actions that may constitute infringement. 7 U.S.C. § 2543.

In sum, the section 2543 crop exemption does not give a farmer an unrestricted right to make brown bag sales of PVPA seed. Section 2543 contains the following limitations:

—a farmer remains subject to infringement under subsections 2341(3) and (4);

—a farmer may only save, use, or sell seed produced from or descended from seed obtained by authority of the PVPA certificate owner for seeding purposes;

—a farmer selling a novel variety must primarily grow crops from that seed for consumption;

—a farmer acquiring a novel variety must primarily grow crops from that seed for consumption;

—a farmer who acquires a novel variety in a brown bag sale can neither save nor sell seed harvested from that seed;

—the sale must comply with state laws; and

—a farmer cannot divert seed originally sold for consumption to planting purposes.

The legislative record accompanying the PVPA underscores the purposes of the crop exemption. The reports of the committees of both houses of Congress stated:

> This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes; to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed for reproductive purposes to other persons so engaged.

H.R.Rep. No. 1605, 91st Cong., 2d Sess. 11 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5093; S.Rep. No. 1138, 91st Cong., 2d Sess. 12 (1970). At no point did the legislative context for the text of the 1970 Act suggest that the crop exemption contains an ensuing crop limitation.

Ensuing Crop Limitation

The district court erred in determining that crop exemption of section 2543 contains an ensuing crop limitation on the amount of seed a farmer can save. The trial court incorrectly read the crop exemption to limit brown bag sales of novel varieties to the maximum amount of seed the selling farmer would save to plant another crop of like size. *Asgrow*, 795 F.Supp. at 919, 22 USPQ2d at 1940. In arriving at its conclusion, the district court stated:

> The language of the statute is that, "it shall not infringe any right hereunder for a person *to save seed produced by him . . . for seeding purposes* and use such saved seed in the production of a crop for use on his farm, or for the sale as provided in this section."

*Asgrow*, 795 F.Supp. at 918, 22 USPQ2d at 1939. The district court determined that "for seeding purposes" modified the verb "save." The court concluded that a farmer could only "save" the amount of seed necessary for "seeding purposes" for ensuing crops.



Essentially the district court restricted the amount of saved seed a farmer may sell to other farmers to a quantity equivalent to one bushel per acre of the seed produced from a protected variety. With respect to soybean farmers such as the Winterboers, this quantity is approximately 1/45 of the farmer's total crop. The Act nowhere contains this restriction.

The district court's reading overlooks important phraseology within section 2543. In the critical passage of the district court's opinion shown above, the ellipses indicate the omission of important language necessary for a correct interpretation. Thus, the court incorrectly concluded that the phrase "for seeding purposes" modified the verb "save." Reading the entire passage without critical omissions shows that "for seeding purposes" modifies the verb "obtained," not "saved":

> [I]t shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes . . . .

7 U.S.C. § 2543. Thus, section 2543 does not contain any explicit limit that a farmer can save and sell only as much seed as necessary to plant an ensuing crop.

Examining the entirety of section 2543, this court notes that the phrase "for seeding purposes" modifies the verb "obtained" in two other clauses in the section:

> A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed *obtained by authority of the owner for seeding purposes* or from seed produced by descent on such farm from *seed obtained by authority of the owner for seeding purposes* shall not constitute an infringement.

7 U.S.C. § 2543 (emphasis added). Thus, the entire context of section 2543 shows that "for seeding purposes" does not modify "save" and create a narrow ensuing crop limitation on the crop exemption. This court recognizes that, without meaningful limitations, the crop exemption could undercut much of the PVPA's incentives. The Act, as written, however, contains no ensuing crop limitation as determined by the District Court.

In sum, section 2543 does not give farmers a blanket right to sell saved seed. Rather the crop exemption has several limitations. A farmer must meet each of these requirements to qualify for the exemption. Because the district court granted Asgrow's motion for summary judgment based on an ensuing crop limitation in section 2543, this court must reverse. On remand, the trial court has the opportunity to develop a full record on the Winterboers' eligibility under the crop exemption.

Section 2541(3)

Under section 2541(3), a farmer infringes the exclusive rights in protected seed by sexually multiplying the novel variety as a step in marketing (for growing purposes) the variety. In two explicit references, the Act clarifies that the crop exemption does not cover farmers who engage in conduct proscribed by subsection (3) of section 2541. Thus, although section 2543 permits farmers to make certain defined brown bag sales without the threat of infringement, section 2541(3) does not permit them to market novel varieties.

An expansive reading of the term "marketing" would swallow the entire crop exemption. The crop exemption explicitly permits farmers to make certain brown bag sales of novel varieties. Read alongside subsection (3) of section 2541, section 2543 permits direct farmer-to-farmer sales where both farmers satisfy the limits of the crop exemption. "Marketing" in the context of the PVPA means extensive or coordinated selling activities, such as



advertising, using an intervening sales representative, or similar extended merchandising or retail activities. This form of marketing of sexually multiplied novel varieties violates exclusive rights under the Act, without regard to the crop exemption. On remand the trial court may again revisit and develop a full record on whether the Winterboers meet the other requirements of the Act.

Notice

Under section 2541(6), it is infringement to:

> (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received; or . . . .

Thus, an individual who transferred a novel variety to another without notice of the transfer of protected seed would infringe exclusive PVPA rights. Section 2543, however, exempts farmers who make limited brown bag sales from this requirement. Section 2543 states:

> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder . . . .

Because subsection (6) is not included as an exception to the crop exemption, a qualifying sale under section 2543 remains exempt from the notice requirement. Therefore, the crop exemption exempts farmers from liability under subsection (6) (as well as subsections (1), (2), (5), (7) and (8)) of section 2541.

Once again, the limited record on appeal permits no ultimate conclusion about whether the Winterboers' sales were exempt under section 2543. If those sales were exempt, however, the notice requirement would not apply.

## CONCLUSION

This court holds that the district court erred in reading an ensuing crop limitation into the crop exemption of the PVPA. Rather the PVPA crop exemption contains the limitations set forth in the statute. Therefore, this court reverses the district court's grant of summary judgment. This action vacates the permanent injunction against the Winterboers. This court also denies Asgrow's motion to strike. This case is remanded to the district court.

## COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED.

LOURIE, Circuit Judge, concurring.

I concur in the result of this case and in the panel's discussion of the limitation on saved seed which was the basis for the district court's decision.

However, I cannot join the remainder of the opinion because it attempts to characterize and interpret other parts of this complex statute that I believe are not before us and have not been briefed.



## APPENDIX B

UNITED STATES DISTRICT COURT
N.D. IOWA, W.D.

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Civ. No. C91-4013

THE ASGROW SEED COMPANY,
*Plaintiff,*

v.

DENNY WINTERBOER and BECKY WINTERBOER
d/b/a DEEBEE'S,
*Defendants.*

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Sept. 30, 1991

On Motion For Clarification Nov. 14, 1991.

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Lawrence C. Maxwell, Trabue and Sturdivant, Nashville, Tenn., and Bruce Stein, Upjohn Co., Kalamazoo, Mich., for plaintiff.

William H. Bode, William H. Bode Associates, Washington, D.C., and Daryl L. Hecht, Crary, Huff, Raby, Inkster, Hecht and Sheehan, P.C., Sioux City, Iowa, for defendants.

DONALD E. O'BRIEN, Chief Judge.

This matter comes before the court pursuant to both parties' motions for summary judgment. After careful consideration of the oral and written arguments this court sustains the plaintiff's motion and denies the defendants' motion.

## FACTS

This is an action under the Plant Varieties Protection Act ("PVPA" or the "Act"). *See*, 7 U.S.C. §§ 2321-2582. In order to avail oneself of the protection of the Act, the developer of a novel plant variety[1] must apply to the Plant Variety Protection office for a Certificate of Plant Variety Protection. 7 U.S.C. § 2482. A certificate grants the breeder the right to exclude others from "selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing . . . a hybrid or different variety therefrom . . ." 7 U.S.C. § 2483(a). The protection lasts for 18 years. 7 U.S.C. § 2483(b).

This action was brought by Asgrow Seed Company against Dennis and Becky Winterboer. The Winterboers are family farmers in Clay County, near Milford, Iowa. The Winterboers have incorporated under the name D-Double-U Corporation, and do business under the name DeeBee's Feed and Seed. Asgrow is a subsidiary of Upjohn, and is in the business of developing agricultural seed and selling it to farmers.

Plaintiff alleges that the defendants engage in "brown-bagging." This refers to a process in which a farmer purchases seed from a company engaged in the development of plant seed. They then plant the seed, harvest it, clean it, and place it in non-descriptive brown bags for sale. Hence the term "brown-bagging."

In December of 1990, Asgrow through an agent, Mr. Ness, went to the Winterboer farm to purchase soybeans. Mr. Winterboer informed Mr. Ness that he had soybean seed for sale that was just like Asgrow varieties A1937 and A2234. Mr. Winterboer called his "just-like" varieties 1938 and 2235. Mr. Ness purchased 20 bags of 1938

[1] A novel variety is defined in 7 U.S.C. § 2401(a) as a variety whose essential and distinctive characteristics will remain unchanged when sexually reproduced.



and 20 bags of 2235. Asgrow took the seeds purchased from the Winterboers to Dr. Matson, Ph.D., a plant biologist employed by Asgrow, who performed tests on the seed. Dr. Matson determined that the seed tested was Asgrow A1937 and A2234.

Asgrow sought an injunction based on the PVPA to prohibit the Winterboers from selling this seed. After two hearings before this court the parties agreed to enter into an injunction. The injunction provided that the defendant would not sell any seed for the 1991 planting season. No representations were made to this court concerning the actions defendants would take with regard to seed for the 1992 crop year.

Asgrow alleges that the defendants' activities which infringe Asgrow's PVPA certificates are:

1. Unauthorized selling. *See*, 7 U.S.C. § 2541(1).
2. Sexually multiplying the varieties as a step in marketing the varieties. *See*, 7 U.S.C. § 2541(3).
3. Dispensing in a form which can be propagated without notice as to being a protected variety under which it was received. *See*, 7 U.S.C. § 2541(6).[2]

## DISCUSSION

It is an infringement of the rights of the owner of a novel variety to perform any of the following acts without the owner's authorization:

> (1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;
>
> . . . . .

[2] This court interprets this language to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety.

> (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or
>
> . . . . .
>
> (6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received;
>
> . . . . .

7 U.S.C. § 2541.

Defendants do not dispute that Asgrow was the owner of a novel variety protected by the Act, nor do they dispute, for purposes of this motion, that they had sold the progeny of the novel variety. However, they argue that they are exempt from the operation of § 2541 by the "farmer exception" provided in 7 U.S.C. § 2543. This section provides that no infringement occurs if:

> . . . a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes . . . [sells] such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable.

7 U.S.C. § 2543. Defendants allege that virtually all of their crops (almost 80%) are sold for other than reproductive purposes, thus they fall within the exception. They also claim, in direct conflict with the plaintiff's allegation, that they have complied with state law.

Plaintiff alleges that the defendants' actions do not fall within the farmers' exemption contained in the PVPA. The farmers' exemption provides:

> Except to the extent that such action may constitute an infringement under subsection (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed



> in the production of a crop for use on his farm, or for sale as provided in this section: *Provided,* That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale in channels usual for such other purposes, of seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.

7 U.S.C. § 2543 (emphasis in original). Plaintiff alleges that the exception limits the amount of seed that can be saved as the amount necessary for seeding purposes. Plaintiff alleges this is the proper definition to give the phrase "saved seed."

The duty of this court is to determine and give effect to the intent of Congress. In *Ozawa v. U.S.*, 260 U.S. 178, 43 S.Ct. 65, 67 L.Ed. 199 (1922), the U.S. Supreme Court held:

> It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if nec-

essary, the literal meaning in order that the purpose may not fail. [citations omitted].

*Id.* at 194, 43 S.Ct. at 67. It is therefore necessary for this court to interpret the statute in a manner which will dictate that the intent of Congress in enacting the PVPA will be accomplished.

Although the legislative history, and thus Congressional intent, on the PVPA is limited, at least one circuit court has determined that Congress intended to create a narrow exemption when creating the farmer exemption. In *Delta and Pine Land Company v. People Gin Company*, 694 F.2d 1012 (5th Cir.1983), the Fifth Circuit held:

> In purpose and operation, the farmer exemption appears to be at odds with the primary purpose of the Act. While the main body of the Act assures developers of novel varieties the exclusive right to sell and reproduce that variety, the crop exemption dilutes that exclusivity by allowing individual farmers to sell the protected variety without liability. *The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.* The less time and effort that is invested, the smaller the chance of discovering superior agricultural products. If less time and effort is invested, long-term benefits to the farmer in the form of superior crops and higher yields will be lost. Although it may appear that the broadest reading of the exemption would benefit farmers today, it could be detrimental to their interest tomorrow.
>
> *Thus, the narrower reading of the exemption is more in keeping with Congress' primary objective.* Such a reading creates the greatest amount of internal harmony in the overall statutory scheme. [citations omitted]. We therefore conclude that *Congress did not intend for the crop exemption to cover every sale from one farmer to another.*



*Id.* at 1016 (emphasis supplied). In the above quoted *Delta and Pine Land Company* case, the court also held that the farmer exception required that sales be made directly from farmer to farmer, thereby prohibiting the use of a middleman to facilitate the sale, despite the fact that the Act contained no such limiting language. *Id.* at 1017. *Delta and Pine Land Company* did not limit the quantity of seed that could be sold in farmer to farmer sales as this court is now doing.

In 7 U.S.C. § 2543 Congress specifically protected the historical and traditional right of small farmers like the Winterboers to make seed sales to fellow farmers. However, the intent of Congress in enacting the PVPA was not to give a farmer an unrestricted right to sell seed. *See, Delta and Pine Land Company* at 1016 ("the crop exception was not intended to provide farmers with unlimited insulation from the negative side effects of the Act"). If so, Congress would have not included the phrase "saved seed" in the code section. The inclusion of the modifier "saved" in describing the amount of "seed" a farmer is allowed to sell indicates a clear congressional intent to place limits on the amount of seed a farmer can sell to other farmers under the Act.

The language of the statute is that, "it shall not infringe any right hereunder for a person *to save seed produced by him . . . for seeding purposes* and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section . . ." Reading the statute as a whole, and giving effect to the intent of Congress, this court concludes that the intent of Congress in enacting this section was to allow a farmer to save seed for his planned seeding purposes. The exception allows a farmer to save, at a maximum, an amount of seed necessary to plant his soybean acreage for the subsequent crop year. For example, if a farmer raised 500 acres of soybeans, had farmed a total of 1000 tillable acres in that crop year, but could reasonably expect to plant a total of 1500 acres of the protected variety in

the subsequent crop year, the maximum amount of seed that could be classified as "saved seed" would be 1500 bushels.[3] A farmer would be limited to saving a combined total of 1500 bushels of the current year's crop. This would allow a farmer to sell the seed not actually planted if market conditions necessitated a change in planting plans.

Although this interpretation of "saved seed" restricts the number of bushel farmers will be able to sell to one another, this court is convinced that the purpose of Congress in enacting the PVPA was to protect the developer of a new line of seed and to allow a farmer to sell the prodigy of the novel variety as limited in the example set out above. This court is aware that a Congressman who was instrumental in the passage of the Act expressed the opinion that a developer would be the only one who could sell the novel seed. As was stated by Rep. Poage:

> I do not think there is any doubt that it [enactment of the PVPA] will mean if somebody produces a seed that gives better results than anybody else's seed, and *if he is the only one who can sell that seed,* then he will get more for it. . . . This is the only way we know to get people to invest their time and money. . . . So in the long run we believe there will be beneficial results for the producers and farmers.

116 Cong.Rec. 40,295-40,303, 40295 (daily ed. Dec. 8, 1970) (emphasis supplied). In a nutshell the defendants' position is that "we can sell all the novel variety that we have grown so long as we sell it to other farmers

[3] This assumes that soybeans will be planted at the rate of one bushel per acre. This court realizes that allowing a farmer to save an amount of seed reasonably necessary to plant the next years crop may lead to situations where courts will be required to determine what amount of seed is reasonably necessary to plant the next year's crop. However, determining if a person's primary occupation is farming is also a factual question which needs to be determined on an *ad hoc* basis.



and follow state law." To allow such an expansive reading of the exception as the defendants espouse would dictate that the owner of the novel variety would not be the only one that could sell the seed. Clearly the intent in enacting the PVPA was to encourage companies to develop improved varieties of seed and to provide for these developers the right to protect this product from unauthorized sales by others. To allow the defendants to sell virtually unlimited amounts of the plaintiff's novel line of seed would lead to a result contrary to the intent of the statute.[4]

This court is aware that placing limits on the amount of seed a farmer may sell to another farmer, rather than merely placing limits on the manner in which the sales may be made, as was done in *Delta and Pine Land Company v. People Gin Company, supra,* is a restrictive reading of the exception. However, this court is convinced that the intent of Congress in enacting the statute was to give farmers more choices, make American agricultural products more competitive in world markets, and thereby ultimately get superior products more resistent to disease and infestation and higher in overall yield and quality, and to assure the developers of novel varieties of sexually reproduced plants the exclusive right to sell, reproduce,

[4] This court realizes that the language "whose primary farming occupation is the growing of crops for sale for other than reproductive purposes" contained in 7 U.S.C. § 2543 may be construed by some as the limiting language in the statute. However, this language would still allow a person qualifying for the exception to sell approximately 40 times the amount of soybean seed bought from the developer of the novel variety. This assumption is logically deduced from the fact that one planted bushel of soybeans yields approximately 40 bushels of soybeans. *See, Plaintiff's Statement of Undisputed Facts,* ex. B. Such sales, if conducted by enough sellers, would dilute or completely eliminate any market for the developer of the novel variety. Such results would lead to decreased spending in the area of research and development. In the long run this would lead to detrimental results to producers and farmers.

import, or export such varieties. *See, 1970 U.S.Code Cong. & Admin.News,* 5082, 5082-83. Such an intent is thwarted when a developer's sales of such seed is diluted by the lower priced sales by those who have contributed nothing to the development of the novel variety.

## CONCLUSION

Saved seed shall be limited to the amount of the protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs in the upcoming crop year. Accordingly, this is the limit that a person qualifying for the "farmer exception" can save for planting and/or sale. Since defendants admittedly have sold much more than this amount of seed, their actions are violations of 7 U.S.C. § 2541(1), and (3). The defendants will not be permitted to continue selling seed in the method commonly referred to as "brown bagging." [5]

*Accordingly, it is ordered,*

1. Plaintiff's motion for summary judgment is sustained.

2. The plaintiff's request for a permanent injunction is sustained. The defendants are hereby enjoined from selling seed, except for saved seed, to other farmers and/or engaging in any form of "brown bagging."

3. Defendants' motion for summary judgment is denied.

4. A separate proceeding shall be held at the court's earliest convenience to determine damages in this matter.

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[5] This court has ruled that the defendants violated the Plant Varieties Protection Act because most of their extensive sales, 10,000 bushels, do not fall within the farmer exception. This court will not rule on the allegations that the defendants violated the Iowa labeling law, because such a determination is not necessary to decide the issue of liability.



Both parties shall file briefs addressing 7 U.S.C. § 2567 and its potential effect on the amount of damages that could be awarded in this action.

## ON MOTION FOR CLARIFICATION

Plaintiff's timely motion for a clarification of this court's order of September 30, 1991 brings this matter before the court. After consideration of the written arguments the court finds that a clarification is warranted.

In the motion to clarify, plaintiff points out that a reading of the courts order, as a whole, reveals that footnote 2 and footnote 5 could arguably be read as being in conflict. In footnote 2 the court stated that:

> This court interprets this language [7 U.S.C. § 2541(6)] to require that if a farmer does sell saved seed to another farmer he must label it as a protected variety.

In footnote 5 the court stated:

> This court has ruled that the defendants violated the Plant Varieties Protection Act because most of their extensive sales, 10,000 bushels, do not fall within the farmer exception. This court will not rule on the allegations that the defendants violated the Iowa labeling law, thereby resulting in a violation of 7 U.S.C. § 2541(6), because such a determination is not necessary to a determination of liability.

After careful review the court agrees with the plaintiff. Plaintiff argues that the court's use of the word "thereby" in footnote 5 could be construed as meaning that there is no violation of 7 U.S.C. § 2541(6) unless state labeling law is violated. As set out in the body of the order the court found a violation of the Federal Act and concluded that a determination of the alleged violation of the labeling requirement was not necessary.

The court now determines that through oversight, an error, as contemplated by Federal Rule of Civil Procedure 60(a), has been made which should be corrected. The said corretcion does not alter in any way the matter now on appeal. Therefore, footnote 5 on page 10 of this court's order of September 30, 1991 is stricken and the following shall be substituted in lieu thereof:

> [Editor's Note—Substitution made in the published opinion.]

In short, what the court was deciding in the order was that the question of any violation of the labeling portion of the Plant Variety Protection Act need not be addressed, as a violation was found under other sections.

IT IS SO ORDERED.



**APPENDIX C**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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No. 92-1048

ASGROW SEED COMPANY,
*Plaintiff-Appellee,*
v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEE'S
*Defendants-Appellants.*

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March 25, 1993.

Opinion of Circuit Judge Rader
Concurring in Denial of Rehearing
En Banc March 29, 1993

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Opinion of Circuit Judge Newman
Dissenting from Denial of Rehearing
En Banc March 25, 1993

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Appealed from: U.S. District Court for the Northern District of Iowa; Chief Judge O'Brien.

Richard L. Stanley and John F. Lynch, Arnold, White & Durkee, Houston, TX, were on the Petition for Rehearing and Suggestion for Rehearing En Banc, filed by plaintiff-appellee. Also on the petition were Bruce Stein, Robert A. Armitage and Sidney B. Williams, Jr.,

The UpJohn Co., Kalamazoo, MI, and Lawrence C. Maxwell, Trabue, Sturdivant and Dewitt, Nashville, TN.

William H. Bode and Robert A. Jaffe, William H. Bode & Associates, Washington, DC, were on the defendants-appellants response to plaintiff-appellee's Petition for Rehearing and Suggestion for Rehearing En Banc.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on April 2, 1993.

Chief Judge NIES, Circuit Judge NEWMAN, Circuit Judge ARCHER, Circuit Judge MICHEL and Circuit Judge PLAGER would rehear the appeal in banc.

RADER, Circuit Judge, concurring in the denial of rehearing en banc.

[Filed March 29, 1993]

Because *Asgrow Seed Co. v. Winterboer*, No. 92-1048 (Fed.Cir. Dec. 21, 1992), correctly interpreted the Plant Variety Protection Act, this court properly declined to rehear the case *en banc*. The Act has a vital and important purpose:

> to provide *the indicated protection* for new varieties . . . so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties.



7 U.S.C. § 2581 (1988) (emphasis added). This court in *Asgrow* acknowledged and respected that purpose.

Section 2543, the crop exemption, helps define "the indicated protection" of the Act. The exemption permits farmers to save, use, and sell seed. 7 U.S.C. § 2543 (1988). The exemption specifically excludes (and thus farmers may not engage in) sexually multiplying seed as a step in marketing. 7 U.S.C. § 2541(3) (1988).

As used in the Act, marketing is not simply selling. The Act uses both words.* The Act prohibits "sexually multiply[ing] the novel variety as a step in marketing." *Id.* The Act permits, under specified circumstances, selling. 7 U.S.C. § 2543. The Act states:

> [I]t shall not infringe any right hereunder for a person to save seed . . . for sale as provided in this section. . . .

*Id.* Indeed if selling and marketing were synonymous, then much of the crop exemption would have no meaning. The Act, however, includes a crop exemption to permit farmers to make brown bag sales.

The district court erred in reading an ensuing crop limitation into the crop exemption. The Act does not limit the amount of seed a farmer may sell to the amount necessary to plant another crop. The Act does not say a farmer may sell seed "saved . . . for seeding purposes." The Act says a farmer may sell seed "produced by him

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* The same section of the Act that prohibits "sexually multiply[ing] the novel variety as a step in marketing" also prohibits separately "sell[ing] the novel variety, or offer[ing] it for sale." 7 U.S.C. § 2541(1), (3). Selling is different from marketing. Although the selling subsection is subject to the crop exemption, the marketing subsection is not. Section 2543 makes this distinction precisely because the crop exemption permits, under specified circumstances, brown bag selling.

from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes." *Id.* Under normal rules of syntax, "for seeding purposes" modifies "obtained." Three different clauses of the crop exemption feature the words "for seeding purposes" as modifiers of "obtained." At no place in the exemption does "for seeding purposes" modify "saved."

PAULINE NEWMAN, Circuit Judge, dissenting from denial of the suggestion for rehearing en banc.

[Filed March 25, 1993]

The panel's interpretation of the "farmer's exemption" provision of the Plant Variety Protection Act is of first impression in this court. The panel, reversing the district court, 982 F.2d 486, has reached an interpretation of this provision that is contrary to the statute and its purpose.

The importance of the issue merits the attention of the full court, for it is not too dramatic to observe that this ruling nullifies the Plant Variety Protection Act as an incentive for innovation in agriculture. If this statutory construction is to be adopted, it should be done *en banc*.

*Statutory Interpretation*

The legislative purpose was uncontroversial, and unambiguously recorded:

> to encourage the development of novel varieties of sexually reproduced plants and to make them available to the public, providing protection available to those who breed, develop, or discover them, and thereby promoting progress in agriculture in the public interest, . . .

H.R.Rep. No. 1605, 91st Cong., 2d Sess., at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5082, 5082. This purpose was not limited to expression in the legislative history; it was enacted in the statute itself:



> 7 U.S.C. § 2581 It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as to afford adequate encouragement for research, and for marketing when appropriate, to yield for the public the benefits of new varieties.

Before enactment of the Plant Variety Protection Act in 1970, developers of sexually reproduced plants (plants grown from seed) were by statute excluded from patent protection, whereas asexually reproduced plants (propagated, *e.g.*, by grafting) were covered by Chapter 15 of the Patent Act. Without some form of protection against reproduction and sale of the seed, developers of new varieties of seed-propagated plants could not recapture their often-extensive research and development costs. Thus the financial incentive for innovation in new varieties in agriculture was absent. The twelve briefs of *amici curiae*, apparently representing the entire seed industry, report how little R & D was done by private enterprise on seed-propagated plants.[1] The *amici* discuss the problems of taxpayer-supported (USDA) plant variety breeding for lack of marketing resources, and the purpose of the Act to obtain industry involvement.

The Plant Variety Protection Act was intended to invigorate industrial development of new varieties, in the

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[1] For example, *amicus curiae* Agripro Biosciences Inc. states that its new product research program, with 111 full time employees and an annual expenditure of six million dollars, "came into existence only after the enactment of the Plant Variety Protection Act", and that development of a new variety takes 8 to 12 years.

Agripro states that it now markets 28 varieties of wheat, all developed in its laboratories after the enactment, and estimates that in the nation over 3,000 new crop varieties have been developed in programs that began after enactment of the Plant Variety Protection Act, as compared with 150 new varieties in the ten years before enactment.

national interest. This was designed to be achieved by providing limited exclusivity to the plant breeder:

> 7 U.S.C. § 2483 [A certificate of plant variety protection gives the breeder the right] to exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom. . . .

The Plant Variety Protection Act provided a measure of control to the commercial developer of a new plant variety, and thus provided the incentive to such development. Upon meeting the requirements of the Act, the plant breeder had the right to exclude others from reproducing or selling the seed for reproductive purposes, with the pragmatic exception that farmers could continue the practice of saving enough seed from one crop to plant the next.

The Act was not designed to permit farmers to grow and sell seed of certified varieties as a business, to enter the commercial seed business in competition with the creator of new variety.[2] The panel majority, by allowing up to half of a farmer's crop to be sold as seed, authorizes this practice, in a travesity of statutory interpretation.

The statute was not designed to place farmers in the seed business; it was designed to strengthen American agriculture by improving the quality and yield of crops for purposes of nutrition and value to the consumer, and to aid in international competitiveness.

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[2] According to *amicus curiae* Jacob Hartz Seed Co., a single bushel of soybean seed will produce between 25 and 45 bushels of soybeans. If only half of the crop is sold as seed in successive years, in three years this would allow the farmer to place on the market between 2,037 and 11,655 bushels of seed. The amicus American Seed Trade Association calculated that a single soybean seed, after three crops, would produce 27,000 seeds.



*The Crop Exemption*

The Act permits the sale of seeds for non-reproductive purposes such as food, animal feed, or in the production of industrial products such as oil or ethanol. The Act also exempts certain shipping, research, and farming activities from some provisions of the act. The "crop exemption" or "farmer's exemption" is the focus of this lawsuit.

The farmer's exemption permits farmers to continue their usual practice of saving part of their crop as seed for replanting on their farms, and to use seed crops for non-reproductive purposes such as animal feed. The exemption also permits a farmer who does not use the saved seed himself to sell it to another farmer, provided that neither farmer is in the seed business. The issue in this case is whether the statute permits more than this limited amount of sale of certified seed. I believe that the panel erred in its interpretation of the relevant provision:

> 7 U.S.C. § 2543 Right to save seed; crop exemption
>
> Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided*, That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A

> bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section § 2567 of this title that his actions constitute an infringement.

There is no dispute that farmers may save seed for their own use, harvested from crops grown from legitimately obtained seed of protected varieties. The statement in § 2543 that a person may "save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes" establishes the category of "saved seed", to which the statute subsequently refers ("such saved seed"). According to § 2543 this saved seed may be used "in the production of a crop for use on his farm, or for sale as provided in this section". Thus we reach the questions of whether the seed the Winterboers sold qualified as "saved seed" and, if so, did they sell more of it than the statute permits.

The first clause of § 2543 provides that the crop exemption does not apply to activities that infringe pursuant to subsections (3) and (4) of section 2541. Section 2541 (3) is one of eight enumerated acts that infringe a certificate owner's rights:

> 7 U.S.C. § 2541. . . . it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts . . .
>
> * * * *
>
> (3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety . . .



Thus the crop exemption of § 2543 does not apply to a novel variety that is sexually multiplied as a step in marketing the variety for growing purposes. Crops grown to be marketed as seed are an infringement, by § 2541(3). Thus crops grown to be marketed as seed are excluded from the crop exemption.

The panel opinion draws a distinction between the word "marketing", as used in § 2541(c), and sales under the crop exemption, apparently believing that the Winterboers may sell their crop as seed as long as they do not "market" it (by engaging in ancillary activities such as advertising). This is a curious construction, for although the niceties of language can always tempt the aficionado, in this case there is no basis for departing from the ordinary, contemporary, common meaning of "marketing" as "selling".[3] Unless otherwise defined the words in a statute are given their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S.Ct. 1180, 1184-85, 43 L.Ed.2d 469 (1975)). There is no basis for the panel's conclusion that Congress silently intended "marketing" to be limited to "extensive or coordinated selling activities", and thus to be different from "selling".

The Winterboers planted 265 acres of certified soybean varieties, and sold the entire usable crop, 10,529 bushels, as seed; enough to plant 10,000 acres. It is undisputed that the Winterboers grew this soybean crop primarily for sale as seed. As discussed *supra*, growing a crop for seed involves "sexually multiplying the novel variety as a step in marketing (for growing purposes) the variety".

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[3] The dictionary defines the verb form of "market" as synonymous with "sell". *E.g.*, Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1984) ("*market vi* (1635): to deal in a market [-] *vt* 1: to expose for sale in a market 2: SELL"); Webster's Third New International dictionary (Merriam-Webster, 1976) ("*vt* 1: to expose for sale in a market: traffic in: sell in a market 2: SELL"). [Capital letters indicate a synonym.]

Their activity thus infringed Asgrow's rights under § 2541 (3). Applying the first clause of § 2543, the seed the Winterboers sold did not qualify as saved seed, hence its sale was not permitted pursuant to the crop exemption. No other section of the Act authorizes the Winterboers' sale of seed for reproductive purposes.

The district court held, applying § 2543, that the amount of seed that may be sold is limited to the amount permitted to be "saved . . . for seeding purposes", and that the amount of seed that could be saved for seeding purposes was limited to what would be necessary for the ensuing crop planting "on his farm", quoting from § 2543. The panel holds that the farmer may sell up to half of the crop as seed, stating that the only limit is whether the "primary farming occupation is the growing of crops for sale for other than reproductive purposes". The panel has misinterpreted this text, for this provision is directed to whether a farmer may sell *any* saved seed, not how much seed the farmer may sell.

To qualify for the crop exemption, the seed must not have been grown for the purpose of sale as seed (§ 2541 (3)). When a farmer saves only enough seed to replant the crop on the farm, and then foregoes such replanting, it may be inferred that such seed is "saved seed", and may be sold. If the farmer wishes to sell more, he must establish that the seed was grown and saved for use other than for sale as seed (*e.g.*, for animal feed). The farmer who sells more seed of a certified variety than he could have planted on his farm has a long row to hoe in proving that the crop was not grown for sale as seed.

The House Report pertaining to § 2543 states:

> This section authorizes a farmer to sell the crop produced from a protected variety for other than reproductive purposes, to save seed from such crop for future use or planting on the farm; or, if his primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such seed for reproductive purposes to other persons so engaged.



H.R.Rep. No. 1605, *supra*, at 11, *reprinted in* 1970 U.S.C.C.A.N. at 5093. This explains the farmer's options under the crop exemption: the crop may be sold for purposes other than use as seed; seed may be saved for future use or planting by the farmer; or such saved seed may be sold to other farmers for use as seed.[4]

The discontinued research projects and abandoned varieties due to massive "brown bag" sales, reported in detail by various *amici curiae*, may not interest farmers such as the Winterboers, who have opportunistically entered the seed business for certified varieties. It is the greater national interest that suffers from this eviscerated incentive to innovate in plant varieties. New disease resistant crops, for example, may lower food costs and be more competitive in international trade; but they may be of less short term impact on individual farmers.

If a statute is "insufficiently precise", it is the court's obligation to serve the statutory purpose. *United States v. Bacto-Unidisk*, 394 U.S. 784, 799, 89 S.Ct. 1410, 1418, 22 L.Ed.2d 726 (1969) (citing *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 124-25, 73 S.Ct. 981, 984-85, 97 L.Ed. 1494 (1953)). This statute was designed to per-

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[4] Witnesses in the hearings before both the House and Senate committees responded to questions from members with the assurance that the proposed legislation would permit farmers to save seed to replant their crops or for other use on the farm, but that the farmers could not sell this seed to others for use as seed. No witness argued that farmers should have greater rights to sell certificated crop seeds. *See generally Plant Variety Protection Act: Hearings on S. 3070 Before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry*, 91st Cong., 2d Sess. (1970); *Plant Variety Protection: Hearings on H.R. 13424, H.R. 13631, H.R. 13658, H.R. 13901, H.R. 14332, and H.R. 15226 Before the Subcommittee on Departmental Operations of the House of Representatives Committee on Agriculture*, 91st Cong., 2d Sess. (1970).

mit continuation of the historical practice of farmers to save seed for their own use, with occasional minor transactions with neighbors on this saved seed. The statute does not authorize the farmer to go into the commercial seed business with half of each crop of certified variety. Instead of resolving an ungainly statute in a way so facially contrary to its purpose, at a minimum the court should rehear the case, with adequate participation from the *amici* and with full briefing of these issues.



## APPENDIX D

THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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No. 92-1048

ASGROW SEED COMPANY,
*Plaintiff-Appellee,*
v.

DENNY WINTERBOER and BECKY WINTERBOER,
d/b/a DEEBEE'S,
*Defendants-Appellants.*

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ORDER

Based on the papers submitted by Asgrow Seed Company, and any response thereto, it is HEREBY ORDERED that Asgrow's motion for a stay of this court's mandate pending Asgrow's filing of a writ of certiorari to the United States Supreme Court, and the final disposition by the Supreme Court of the issues raised by that writ, is GRANTED.

Date: 4/12/93

/s/ Francis X. Gindhart, Clerk
For the Court

## APPENDIX E

## STATUTES INVOLVED

### 7 U.S.C. § 2541. Infringement of plant variety protection

Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a novel variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a novel plant variety with the notice under section 2567 of this title:

(1) sell the novel variety, or offer it or expose it for sale, deliver it, ship it, consign it, exchange it, or solicit an offer to buy it, or any other transfer of title or possession of it;

(2) import the novel variety into, or export it from, the United States;

(3) sexually multiply the novel variety as a step in marketing (for growing purposes) the variety; or

(4) use the novel variety in producing (as distinguished from developing) a hybrid or different variety therefrom; or

(5) use seed which had been marked "Unauthorized Propagation Prohibited" or "Unauthorized Seed Multiplication Prohibited" or progeny thereof to propagate the novel variety; or

(6) dispense the novel variety to another, in a form which can be propagated, without notice as to being a protected variety under which it was received; or

(7) perform any of the foregoing acts even in instances in which the novel variety is multiplied other than sexually, except in pursuance of a valid United States plant patent; or



(8) instigate or actively induce performance of any of the foregoing acts.

### 7 U.S.C. § 2543. Right to save seed; crop exemption

Except to the extent that such action may constitute an infringement under subsections (3) and (4) of section 2541 of this title, it shall not infringe any right hereunder for a person to save seed produced by him from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes and use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section: *Provided,* That without regard to the provisions of section 2541(3) of this title it shall not infringe any right hereunder for a person, whose primary farming occupation is the growing of crops for sale for other than reproductive purposes, to sell such saved seed to other persons so engaged, for reproductive purposes, provided such sale is in compliance with such State laws governing the sale of seed as may be applicable. A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement. A purchaser who diverts seed from such channels to seeding purposes shall be deemed to have notice under section 2567 of this title that his actions constitute an infringement.